SUPREME COURT, U. S.

No. 73-307

In the

Supreme Court of the United States

OCTOBER TERM, 1973.

Supreme Court, U. S.
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EDWARD Q. LUPIA, individually and for and on behalf, pursuant to Rule 23 of the Federal Rules of Civil Procedure, of other distributors of Stella D'Oro Biscuit Co., Inc., a New York corporation, similarly situated, as a class,

Petitioner,

vs.

STELLA D'ORO BISCUIT CO., INC., a New York corporation,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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INDEX

PAGE

Opinions below 2

Jurisdiction 3

Questions Presented For Review 3

Statutes Involved 4

Statement of the Case 6

Reasons for Granting The Writ 12

Conclusions 29

Appendix A 1a

Appendix B 3a

List of Authorities Cited

Cases

Supreme Court Decisions:

Brown Shoe Co. v. *United States*, 370 U.S. 294, 306-309 (1962), 82 S. Ct. 1502, 8 L.Ed.2d 510 .. 14

Cohen v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546-547 (1949), 69 S. Ct. 1221, 93 L.Ed. 1528 ....3, 13, 14, 15, 16, 19, 22, 23, 24, 26, 27, 28

Construction Laborers v. *Curry*, 371 U.S. 542, 548-549 (1963) 14

Gillespie v. *U.S. Steel Corp.*, 379 U.S. 148, 152-154 (1964), 85 S. Ct. 308, 136 L.Ed. 2d 199 14

Sears, Roebuck & Co. v. *Mackey*, 351 U.S. 427 (1956), 76 S. Ct. 895, 100 L.Ed. 1297 14

Swift & Co. v. *Compania Caribe*, 339 U.S. 684, 688-689 (1950), 70 S.Ct. 861, 94 L.Ed. 1206 14

PAGE

Court Of Appeals Decisions:

Caceres v. *International Air Transport Association*, 422 F.2d 141 (2d Cir. 1970) 21, 22

City of New York v. *International Pipe & Ceramics Corp.*, 410 F.2d 295, 300 (2d Cir. 1969) 21, 22

Eisen v. *Carlisle & Jacquelin*, 370 F.2d 119 (2d Cir. 1966), cert. denied 386 U.S. 1035, 87 S.Ct. 1487, 18 L.Ed 2d 598 (1967) 20, 21, 22

Green v. *Wolf Corporation*, 406 F.2d 291 (2d Cir. 1968) 20

Hackett v. *General Host Corporation*, 455 F.2d 618, 627 (3rd Cir. 1972), cert. denied 407 U.S. 925 (1972) 14-15, 19, 22-23

International Business Machines Corp. v. *United States*, 471 F.2d 507 (2d Cir. 1972) 21

Korn v. *Franchard Corporation*, 443 F.2d 1301, 1305, 1307 (2d Cir. 1971) 21

Lerman v. *Tenney*, 459 F.2d 482 (2nd Cir. 1972) .. 21

Songy v. *Coastal Chemical Corporation*, 469 F.2d 709 (5th Cir. 1972) 23

Thill Securities Corp. v. *New York Stock Exchange*, 469 F.2d 14, 17 (7th Cir. 1972) 24

Weingartner v. *Union Oil Company*, 431 F.2d 26 (9th Cir. 1970), cert. denied 91 S.Ct. 459, 400 U.S. 1000, 27 L.Ed. 2d 451 23

District Court Decisions:

Free World Foreign Cars v. *Alpha Romeo*, 55 F.R.D. 26, 31 (S.D. N.Y. 1972) 17

Gains v. *Budget Rent-A-Car Corp. of America*, 1972 Trade Cases, Sec. 73,860 (N.D. Ill. 1972) .. 17

PAGE

John T. McMackin d/b/a McMackin Hardware Co., et al., v. *Schwinn Bicycle Company*, (N.D. Ill. E.D.—Case No. 71 C 2751) 17

Seligson v. *Plum Tree, Inc.*, 1972 Trade Cases, Sec. 74,098, E.D. Pa. 1971) 17

STATUTES

28 U.S.C. Sec. 1291 ....3, 4, 13, 14, 15, 16, 20, 21, 22, 23, 24, 25, 26

28 U.S.C. Sec. 1292(b) 4, 5, 23, 25, 26

28 U.S.C. Sec. 1651 .....3, 5, 22, 23, 28

Rule 23, Federal Rules of Civil Procedure 2, 3, 4, 5-6, 11, 12, 16, 17, 18, 19, 26, 27, 28

LAW REVIEWS

"*Interlocutory Appeal From Order Striking Class Action Allegations*, 70 Columbia Law Review 1292 (1970) 25, 26, 27, 28

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973.

EDWARD Q. LUPIA, individually and for and on behalf, pursuant to Rule 23 of the Federal Rules of Civil Procedure, of other distributors of Stella D'Oro Biscuit Co., Inc., a New York corporation, similarly situated, as a class,

Petitioner,

vs.

STELLA D'ORO BISCUIT CO., INC., a New York corporation,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

To: The Honorable Chief Justice and Justices of the Supreme Court of the United States:

Edward Q. Lupia, individually and for and on behalf, pursuant to Rule 23 of the Federal Rules of Civil Procedure, of other distributors of Stella D'Oro Biscuit Co., Inc., a New York corporation, similarly situated, as a class, Petitioner herein, respectfully petitions for a Writ of Certiorari to review the judgment order of the United States Court of Appeals for the Seventh Circuit entered in this cause on May 18, 1973, dismissing for want of jurisdiction the Appeal theretofore filed (pursuant to Notice of Appeal duly filed on November 15, 1972) and

docketed in timely fashion in said court of review by the Petitioner.

Said Appeal sought to review that part of the District Court's Order and Memorandum of Decision, dated November 2, 1972, which denied Petitioner's (plaintiff below) motion that the cause (a treble damage action, in five counts, for alleged violation of the Federal Antitrust Laws by the defendant) be confirmed as a class action under Rule 23, and dismissed Count V of the Complaint, which separately asserts the class action allegations.

The United States Court of Appeals for the Seventh Circuit in dismissing said Appeal for want of jurisdiction did so on the ground that the District Court order appealed from (viz. the Order of November 2, 1972 refusing to confirm the cause as a class action and dismissing the class action count) was not an appealable order.

The Order of May 18, 1973 by the United States Court of Appeals for the Seventh Circuit, in addition to dismissing Petitioner's appeal, also dismissed two other unrelated class action appeals, then pending before the said court of review, for the same reason.

OPINIONS BELOW

The order of May 18, 1973 of the United States Court of Appeals for the Seventh Circuit, as yet unreported in the official reports, is set forth in Appendix A (*infra,* p. 1a). The Order and Memorandum of Decision of the District Court (the United States District Court for the Northern District of Illinois, Eastern Division), dated November 2, 1972, as yet unreported in the official reports, is set forth in Appendix B (*infra,* p. 3a).

JURISDICTION

The judgment order of the United States Court of Appeals for the Seventh Circuit sought to be reviewed was entered on May 18, 1973. The jurisdiction of this Court is invoked under 28 U.S.C.A. Sections 1254 (1) and 2101 (c).

THE QUESTIONS PRESENTED FOR REVIEW

The immediate questions presented for review by the within Petition For A Writ of Certiorari are as follows:

(1) Whether an Order of the District Court, in a civil antitrust case for treble damages and appropriate declaratory and injunctive relief, denying Plaintiff's motion that the cause be confirmed as a class action, pursuant to Rule 23 of the Federal Rules of Civil Procedure, and dismissing that particular count of the Complaint which separately asserts the class action allegations, is a final and appealable order within the purview of 28 U.S.C. Section 1291 and the guidelines set out by this Honorable Court in *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541, 93 L.Ed. 1528, 69 S. Ct. 1221 (1949)?

(2) In the alternative, whether the District Court's order in question is otherwise properly reviewable by the Court of Appeals, by treating Petitioner's Notice of Appeal, and brief in the Court of Appeals, as a Petition for Mandamus under 28 U.S.C. Section 1651?

The substantive question sought to be reviewed in the Court of Appeals is as follows:

> Whether the terminated status of a distributor operates per se, under Rule 23 of the Federal Rules of Civil Procedure, to bar such past distributor from maintaining an antitrust class action against the manufacturer on behalf of a class made up of current as

well as past distributors of the manufacturer, on the ground that such past distributor cannot per se properly and fairly represent a class including current distributors, where, as here: (i) the class action was filed within less than 3 months after the termination of said distributor's prior distributorship of some 10½ years duration, (ii) said distributor was the largest distributor of the manufacturer in the United States of America in terms of the volume of merchandise purchased from the manufacturer, (iii) the terms of the defendant manufacturer's contractual agreements with its various distributors, past and current, were and are similar and almost identical in nature and content to plaintiff distributor's contractual agreement with the manufacturer, and (iv) where the pattern and gravamen of the defendant manufacturer's alleged unlawful antitrust activities and practices in relationship to its distributors were and are common to all distributors, whether current or past?

STATUTES INVOLVED

28 U.S.C. Section 1291 provides as follows:

"The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, * * * except where a direct review may be had in the Supreme Court."

28 U.S.C. Section 1292 (b) provides as follows:

"(b) When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the

litigation, he shall so state in writing in such order. The Court of Appeals may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: *Provided, however,* That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order."

28 U.S.C. Section 1651 provides as follows:

"(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

(b) An alternative writ or rule nisi may be issued by a justice or judge of a court which has jurisdiction."

Rule 23 of the Federal Rules of Civil Procedure (Title 28) provides as follows:

"(a) **Prerequisites to a Class Action.** One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

(b) **Class Actions Maintainable.** An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of

(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action."

STATEMENT OF THE CASE

I.

The Nature Of The Case

This is an antitrust class action seeking injunctive relief and treble damages brought by a former exclusive distrib-

utor of the defendant, Stella D'Oro Biscuit Co., Inc., a New York corporation engaged in the manufacture and sale of cookies, biscuits and breadsticks, on behalf of himself and other distributors. The plaintiff, Lupia, is a citizen of Illinois whose recently terminated distributorship embraced the northeastern Illinois area, including the Chicago Metropolitan Area, as well as parts of southern Wisconsin, northern Indiana and southern Michigan. Plaintiff was an exclusive distributor of the defendant from on or about September 23, 1961 to on or about December 31, 1971 (a period in excess of 10 years). The instant lawsuit was filed on March 22, 1972, within less than three months after the termination of plaintiff's distributorship.

Plaintiff's distributorship was "exclusive" in that he was contractually barred from selling baked products other than Stella D'Oro's and from selling outside the territory assigned to him by the agreement. The complaint, which is in five (5) Counts, alleges violations of Sections 2 (a) and 2 (c) of the Robinson-Patman Act, Section 1 of the Sherman Act and Section 3 of the Clayton Act, all growing out of the exclusive distributorship arrangement and pricing practices of the defendant. Counts I through IV inclusive are brought by plaintiff in his individual capacity, and Count V is brought by the plaintiff as a class action, pursuant to Rule 23, for on behalf of other distributors of Stella D'Oro Biscuit Co., Inc., similarly situated.

Count V, the class action count, embraces and realleges the essential allegations of Counts I, II, III and IV of the Complaint, alleges injury and monetary damages to the various distributors of the defendant by reason of the alleged unlawful antitrust activities and practices of the defendant in relationship to such distributors, including

the plaintiff, and seeks appropriate declaratory and injunctive relief on behalf of the distributor members of the class, including the plaintiff, to bring a halt to the alleged unlawful antitrust practices of the defendant, as well as treble monetary damages under 15 U.S.C. Section 15.

Plaintiff's Complaint charges the defendant with continuing commission of the following alleged unlawful antitrust practices, in relationship to the plaintiff and the defendant's various distributors:

(1) Unlawful price discrimination in the form of the granting and the payment by the defendant manufacturer of a discriminatory and unlawful 5% discount or allowance to chain stores and the charging back of said unlawful discounts to defendant's distributors, (both "exclusive" and "non-exclusive" distributors) thereby compelling said distributors to absorb said unlawful discount granted by defendant to chain and multi-store retailers, in per se violation of Section 2(c) of the Robinson Patman Act, and in further violation of Section 2(a) of the Robinson Patman Act. (Counts I and V of the Complaint).

(2) The unlawful receipt by and payment to the defendant of an unlawful broker's fee, discount, commission, or compensation, within the purview of Section 2(c) of the Robinson Patman Act, and in per se violation thereof, arising out of defendant's practice of barring its exclusive distributors from selling or offering for sale any baked products manufactured by any other firm, whether competitive or not, but permitting its distributors to purchase certain baked products of other bakery manufacturers only if purchased through said defendant, in per se violation of Section 2(c) of the Robinson Patman Act, and

in further violation of Section 1 of the Sherman Antitrust Act (15 U.S.C.A. Sec. 1) and Section 3 of the Clayton Antitrust Act (15 U.S.C.A. Sec. 14). (Counts II and V of the Complaint.)

(3) Unlawful and unreasonable contractual restraints of trade, which bar defendant's distributors from selling or offering for sale the bakery products of other manufacturers, whether competitive or not, during the term of the distributorship, and for a period of one year after the termination of the distributorship, in violation of Sec. 1 of the Sherman Antitrust Act (15 U.S.C.A. Sec. 1). (Counts II and V of the Complaint.)

(4) Price discrimination in the form of discriminatory and varying non-uniform trade discounts given by the defendant to its various distributors (both "exclusive" and "non-exclusive" distributors) in connection with the purchase by such distributors of the products, of like grade and quality, sold by the defendant, in violation of Sec. 2(a) of the Robinson Patman Act. (Counts III and V of the Complaint.)

(5) Unlawful vertical price fixing practices by the defendant in per se violation of Sec. 1 of the Sherman Antitrust Act, for which injunctive relief is sought (Counts IV and V of the Complaint) under 15 U.S.C.A. Sec. 26.

Since about 1967, through 1971, the plaintiff was the largest single distributor of the defendant in the United States, with his annual volume of purchases of defendant's products exceeding one million dollars per year for the past seven years, 1965 through 1971 inclusive.

Plaintiff seeks to represent a class comprised of 34 current exclusive distributors of defendant located in 17 states, 56 current nonexclusive distributors located in some 26 states, 13 former exclusive and two former nonexclusive distributors, located in 7 states, whose distributorships were in effect within the four year period immediately preceding the filing of suit on March 22, 1972, and such other presently undisclosed distributors as would qualify as members of the above categories.

Plaintiff's measure of individual damages, if successful, is substantial; being tentatively estimated at $700,000.00 in the Memorandum Decision of the District Court Judge.

Count V of plaintiff's Complaint alleges that the terms of defendant's contractual agreements with its various distributors are similar in nature and content to plaintiff's contractual agreements of September 23, 1961 and December 30, 1963, except that defendant's nonexclusive or multi-distributors are permitted to sell the products of other bakery firms, and that the alleged antitrust violations and practices upon the part of the defendant charged in Counts I through V inclusive of plaintiff's Complaint are common to defendant's relationship to its other distributors as well as to defendant's relationship to the plaintiff. All of the 'exclusive' distributors of the defendant, whether current or past, operated under and continue to operate under written contractual agreements with the defendant almost identical in language, nature and content (except for territory designation and the percentage of trade discount at which defendant's products are sold by the defendant to particular distributors). Each of the various forms of unlawful antitrust activities and practices engaged in upon the part of the defendant were and are, almost without exception,

common and identical to each and every exclusive distributor of the defendant, whether past or present; and except for the fact that the so-called nonexclusive distributors could sell the products of other bakery manufacturers, the pattern or gravamen of defendant's unlawful antitrust activities as alleged in plaintiff's Complaint was and is basically the same as to defendant's nonexclusive distributors (whether present or past) as to defendant's exclusive distributors (whether present or past). Like the exclusive distributors, the nonexclusive distributors were subject to: (1) the unlawful and discriminatory 5% chain store discounts granted by the defendant and passed on to defendant's distributors, (ii) discriminatory trade discounts given by the defendant to its various distributors in connection with the sale by defendant to its various distributors of products of like grade and quality, and (iii) the unlawful vertical price fixing practices engaged in by the defendant in connection with the sale of its products.

II.

The Proceedings In The Courts Below

In the proceedings below, Plaintiff, by appropriate motion, moved the District Court that the cause be confirmed and proceed as a class action pursuant to Rule 23; and defendant, among other things, moved to dismiss the Complaint on the grounds of improper venue and lack of personal jurisdiction, or, in the alternative to transfer the action to the Southern District of New York under 28 U.S.C. Sec. 1404 (a).

On November 2, 1972, the District Court, among other determinations made in the cause, denied defendant's motions to dismiss the cause for improper venue, or in the

alternative to transfer the cause to the Southern District of New York; and denied plaintiff's motion that the cause be confirmed as a class action, and dismissed Count V of the Complaint, which separately asserts the class action allegations. See Appendix (*infra*, p. 3a).

Plaintiff's Notice of Appeal, filed on on November 15, 1972, appeals from that part of the District Court's order and Memorandum of Decision which denied plaintiff's motion that the cause be confirmed as a class action under Rule 23, and dismissed Count V of the Complaint, which separately asserts the class action allegations.

On May 18, 1973, the United States Court of Appeals for the Seventh Circuit dismissed said Appeal for want of jurisdiction on the ground that the Order appealed from was not an appealable order. See Appendix (*infra*, p. 1a).

REASONS, AND ARGUMENT IN SUPPORT THEREOF, FOR ALLOWANCE OF THE WRIT.

Petitioner respectfully submits the following as reasons which justify the allowance of a Writ of Certiorari in this cause and a review by this Honorable Court of the issues here presented for review:

(1) The decision of the Seventh Circuit in the instant cause is in conflict with applicable decisions of the Supreme Court of the United States.

(2) The decision of the Seventh Circuit in the instant cause is in conflict with decisions of the Courts of Appeal of other circuits involving the same question, and a conflict exists among the various federal circuits on an issue involving a significant federal remedy, and a valuable right conferred upon liti-

gants, that should be settled by the Supreme Court of the United States.

It is the position of the Petitioner that the District Court's order of November 2, 1972, denying plaintiff-appellant's motion that the cause be confirmed as a class action under Rule 23, and dismissing Count V of the Complaint, which separately asserts the class action allegations, meets the tests of "finality" mandated by the Supreme Court of the United States in *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U. S. 541 (1949), and is a final and appealable order within the purview of 28 U.S.C. Sec. 1291.

In *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546-547 (1949) the Supreme Court of the United States in holding appealable as a final decision or order, within the purview of Title 28 U.S.C. Sec. 1291, an order of a Federal District Court denying a corporation's motion that the plaintiff in a stockholder's derivative action be required, pursuant to a state statute, to give security for the reasonable expenses of the defendants in connection with the action, said:

> ". . . But this order of the District Court did not make any step toward toward final disposition of the merits of the case and will not be merged in final judgment. When that time comes, it will be too late effectively to review the present order, and the rights conferred by the statute, if it is applicable, will have been lost, probably irreparably. We conclude that the matters embraced in the decision appealed from are not of such an interlocutory nature as to affect, or to be affected by, decision of the merits of this case."
>
> "This decision appears to fall in that small class which finally determine claims of right separable from, and collateral to, rights asserted in the action,

too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated. The Court has long given this provision of the statute this practical rather than a technical construction. *Bank of Columbia* v. *Sweeney*, 1 Pet. 567, 569; *United States* v. *River Rouge Co.*, 269 U.S. 411, 414; *Cobbledick* v. *United States*, 309 U.S. 323, 328."

"We hold this order appealable because it is a final disposition of a claimed right which is not an ingredient of the cause of action and does not require consideration with it."

The guidelines set forth aforesaid in *Cohen* v. *Beneficial Industrial Loan Corp., supra*, as to when an order is final and appealable under Section 1291 have not been overruled and are still the governing law today. See *Gillespie* v. *U.S. Steel Corp.*, 379 U.S. 148, 152-154 (1964); *Construction Laborers* v. *Curry*, 371 U.S. 542, 548-549 (1963); *Brown Shoe Co.* v. *United States*, 370 U.S. 294, 306-309 (1962); *Sears, Roebuck & Co.* v. *Mackey*, 351 U.S. 427 (1956); *Swift & Co.* v. *Compania Caribe*, 339 U.S. 684, 688-689 (1950). In all of these cases the lower court's order was held to be final and appealable. As the Supreme Court said in *Brown Shoe Co.* v. *United States, supra*, in an antitrust action where the District Court order enjoined a merger and directed a divesture: "It is ripe for review now, and will, thereafter, be foreclosed."

As Judge Rosenn of the Third Circuit pointed out in *Hackett* v. *General Host Corporation*, 455 F.2d 618, 627 (C.A. 3rd, decided Jan. 14, 1972):

"There are essentially three elements that must be satisfied under the *Cohen* test: (1) the rights determined must be separable from and collateral to the merits of the case (2) the question must be too important to deny review at this point; and (3) the

time for review is ripe and cannot await the ultimate final judgment because the rights may be lost irreparably through the delay. 9 Moore's Federal Practice ¶ 110.10, at 133."

"Subsequent cases clarified the scope of the *Cohen* rule. Swift & Co. Packers v. Compania Colombiana del Caribe, 339 U.S. 684, 70 S.Ct. 861, 94 L.Ed. 1206 (1950), held that the order of the district court vacating the attachment of a maritime lien was appealable under *Cohen*. The Court stressed two elements: (1) the issue was collateral to the merits; and (2) restoring the right to attachment and the lien at a later time "would be an empty rite." (Id. at 689, 70 S.Ct. 861) Shortly thereafter, Roberts v. United States District Court for Northern Dist. of Cal., 339 U.S. 844, 70 S.Ct. 954, 94 L.Ed. 1326 (1950), held the denial of a petition to proceed in forma pauperis collateral and appealable under Section 1291. These two cases demonstrate that the important rights which may be lost through delay need not rise to the level of the constitutional questions involved in *Cohen*."

"So long as the decision affects the basic right of the litigant to proceed, or finally determines a claim separable from and independent of the substantive issues, so that a later review of it when an appeal is taken from the final judgment on the merits becomes an empty rite, the *Cohen* test is met. This element of irreparably affecting important rights of a party to the litigation has become a cornerstone of the judicial approach to collateral order questions."

• • •

"This approach to the appealability of a collateral order under Section 1291 is independent of any discretionary appeal under Section 1292(b). If class action orders are collateral, appeal as of right would exist independently and exclusively of the 1958 Act. See Note, Interlocutory Appeal from Orders Striking Class Action Allegations, 70 Colum.L.Rev. 1292, 1302—3 (1970)."

> "I conclude then that when an order will irreparably affect the basic rights of a party and is sufficiently collateral to the merits that subsequent decisions will not involve this question, it has sufficient finality under *Cohen* to be appealable under Section 1291."

It is respectfully submitted that the Petitioner meets the three essential elements of finality that must be satisfied under the *Cohen* test to be entitled to appeal as a matter of right under Section 1291.

Present Rule 23 provides for a significant federal remedy and confers a valuable right upon litigants. That right, to maintain a class action on behalf of other members of the class, provided the requirements of Rule 23 are met, is clearly separable from and collateral to the merits of Petitioner's cause or causes of action against the defendant.

Secondly, the question as to whether or not a class action is properly maintainable by the Petitioner, and whether or not the District Court erred in the exercise of its discretion under Rule 23 in denying Petitioner's motion to confirm the cause as a class action, and in dismissing the class action count (Count V) of the Complaint, is too important a question to deny review at this time. For at stake are not only the rights of other potential members of the class, but whether or not the continuing pricing policies and practices of the defendant alleged to be in violation of the Federal Antitrust Laws are to be permitted to continue.

In this connection it should be noted that the District Courts, including judges in the same judicial district, are split on the substantive issue here sought to be reviewed in the Seventh Circuit, and that there is no

definitive decision by any of the Federal Circuit Courts of Appeal or this Court on that substantive issue.

That substantive issue is whether the terminated status of a distributor operates per se, under Rule 23 of the Federal Rules of Civil Procedure, to bar such past distributor from maintaining an antitrust class action against the manufacturer on behalf of a class made up of current as well as past distributors of the manufacturer, on the ground that such past distributor cannot per se properly and fairly represent a class including current distributors.

Thus District Court Richard W. McLaren of the United States District for the Northern District of Illinois, Eastern Division (the same district wherein the present cause arises), in an unreported decision dated September 29, 1972 entitled as *John T. McMackin d/b/a Mackin Hardware Co., et al.*, v. *Schwinn Bicycle Company* (Case No. 71 C 2751) said:

> "The Court is not persuaded that termination of the franchise, standing alone, bars plaintiff from representing present as well as former franchisees." (citing *Seligson* v. *Plum Tree, Inc.*, 1972 Trade Cases, Sec. 74,098, T.D. Pa. 1972)

In contract is the decision of the District Court Judge in the instant cause, and the two cases cited by said District Court Judge in his Memorandum Decision, viz. *Free World Foreign Cars* v. *Alpha Romeo*, 55 F.R.D. 26, 31 (S.D. N.Y., 1972), and *Gaines* v. *Budget Rent-A-Car Corp. of America*, 1972 Trade Cases, Sec. 73,860 (N.D. Ill., 1972).

Petitioner's position on the substantive issue sought to be reviewed in the Court of Appeals for the Seventh Circuit is that Rule 23 does not purport to define or de-

lineate membership in a class in terms of whether one is current or past member of the class, and does not purport per se to limit membership in a class to only current members to the exclusion of previous or past distributors. It was and is the position of the Petitioner that for the District Court to read such an unwarranted requirement into Rule 23 would be to create a legal abortion that could substantially impair, if not destroy, the efficacy and function of class actions in the private enforcement of the Antitrust Laws; since in many, if not most cases, the spark generating the filing of the antitrust lawsuit by a legitimately aggrieved distributor is the termination of his distributorship.

As for the third test, *viz.* that the time for review is ripe and cannot await the ultimate final judgment because the rights may be lost irreparably through delay; it is apparent that Petitioner in the instant cause clearly meets this test. Given the fact that there are common questions of fact and law involved as to the alleged antitrust violations of the defendant which can more expeditiously and less expensively be determined in a class action proceeding; the fact that a final judgment in favor of the Petitioner, if appeal as to the class action denial is deferred, will only determine the Petitioner's rights to recover and require the other potential class members to fend for themselves in separate multiple lawsuits; and the fact that the four years Statute of Limitations applicable to antitrust actions (under 15 U.S.C.A. Sec. 15 (b)) will have undoubtedly run its course by the time final review of Petitioner's antitrust cause of action is completed, and operate as a bar to other members of the proposed class (whereas the pendency of the class action stops the running of the Statute of Limitations as to

class members during the pendency of the class action): it is clear that the time for review, if it is to have any meaning, is now, and that irreparable rights will be lost if such appeal is delayed. Delay can only aid and serve the nefarious ends of the antitrust wrongdoer. Rule 23 may be seen as an extension by the Supreme Court, acquiesced in by Congress, of the deterrent policies of the Federal Antitrust Laws. That deterrent should not be negated by unintentional judicial distortion of the clear intent and meaning of the guidelines and mandate laid down by the Supreme Court of the United States in the *Cohen* case, *supra.*

Whether an order dismissing the class action portion of a complaint is an appealable order, and if so on what theory or basis, is a much disputed question on which the various Circuits of the United States Court of Appeals are currently very much in dispute.

Rule 23 of the Federal Rules of Civil procedure, in the form of the Federal class action, provides a viable and valuable device and tool for permitting numerous large claims to be adjudicated efficiently, and is a potent weapon for plaintiffs claiming small amounts under a statutory cause of action for which there is no jurisdictional requirement regarding the amount in controversy. In addition, class actions tend to reenforce the regulatory scheme by providing an additional deterrent beyond that afforded either by public enforcement or by single-party private enforcement. Thus, the deterrent policies of the Federal Antitrust Laws are very much served by appropriate use of the class action remedy provided by Rule 23. See *Hackett* v. *General Host Corporation,* 455 F. 2d 618, 623 (3rd C.A. 1972), certiorari denied 407 U.S. 925 (1972).

For the class action device to remain effective, however, adequate appellate supervision and review must be available.

What form, if any, that appellate supervision and review should take, is a question on which the various Circuits of the United States Court of Appeals are in such a state of disagreement and disarray that the definitive and final judgment and guidance of the Supreme Court of the United States is very much needed to end the state of confusion that now exists in the law.

In *Eisen* v. *Carlisle & Jacquelin,* 370 F. 2d 119 (2d Cir. 1966), cert. denied 386 U.S. 1035, 87 S. Ct. 1487, 18 L. Ed. 2d 598 (1967), the Second Circuit permitted an appeal of right from an order striking the class action allegations from the plaintiff's complaint, without reference to either 28 U.S.C. Section 1292 (b) 28 U.S.C. Section 1651. The Court held that because the plaintiff's individual claim, asserted under the Securities Exchange Act, amounted to only $70, the order would be the "death knell of the action" unless immediate appeal was allowed, and that, therefore, the order of the District Court was final within the meaning of 28 U.S.C. Sec. 1291. The *Eisen* holding, supra, so far as it went, was consistent with the "practical" interpretation of the final judgment rule that has long been encouraged by the Supreme Court of the United States.

The *Eisen* case, *supra,* was followed by *Green* v. *Wolf Corporation,* 406 F.2d 291 (2d Cir. 1968), *cert. denied,* 395 U.S. 977 (1969), where an order dismissing the class action portion of the Complaint was held appealable.

Unfortunately, two later cases out of the Second Circuit, viz. *City of New York* v. *International Pipe & Ceramics Corp.*, 410 F. 2d 295, 300 (2d Cir. 1969), and *Caceres* v. *International Air Transport Association*, 422 F. 2d 141 (2d Cir. 1970) confined the rule in the *Eisen* case, *supra*, to granting review as a matter of right to those cases in which the plaintiff's individual claim was so small that it would be unrealistic to expect the plaintiff to carry on the action on his own if the class action device was not available. In the *International Pipe & Ceramics* case, *supra*, Judge Hays dissented, taking the position that the dismissal of the class action portion of the complaint should be considered final within the meaning of U.S.C. Sec. 1291 for purposes of allowing an appeal. While Judge Hays concurred in the *Caceres* case, *supra*, he did so only because he felt himself bound by the majority decision in the *International Pipe & Ceramics* case, *supra*.

Th unwarranted limitations imposed by the aforesaid two case noted above on the *Eisen* case, supra, has since led the Second Circuit to have doubts and second thoughts as to the feasibility and propriety of the "death knell" doctrine as thus limited. See *Korn* v. *Franchard Corporation*, 443 F.2d 1301, 1305, 1307 (2d Cir. 1971), where Judge Friendly in his concurring opinion invited *"enlightenment from the Supreme Court,"* and *Lerman* v. *Tenney*, 459 F.2d 482 (2d Cir. 1972), where Chief Judge Friendy again invited enlightenment from the Supreme Court, saying: ". . . *there is hope that this issue will be settled by the highest authority.*"

In a more recent case, *International Business Machines Corp.* v. *United States*, 471 F. 2d 507 (2d Cir. 1972), the Second Circuit held that it had jurisdiction of a computer company's appeal from an order in an antitrust

action requiring it to produce for government inspection documents claimed by the computer company to be privileged and protected by pretrial discovery orders of a federal district court in Minnesota in a private antitrust action. The Second Circuit held such order to be "a final determination of claim of right separable from and collateral to rights asserted in main action," and held such order to be a final order within the purview of 28 U.S.C. Sec. 1291 and the *Cohen* case, *supra.* In addition, the Second Circuit also held that "mandamus" (under 28 U.S.C. Sec. 1651) was an appropriate means of reviewing the order appealed from.

The mischief created by the *International Pipe & Ceramics* and *Caceres* cases, *supra,* has led the Third Circuit to specifically reject the "death knell" doctrine of the Second Circuit (as modified by the two cases aforesaid), and the Seventh Circuit to ignore that doctrine and look elsewhere for its rationale and approach to the question here presented for review. On the other hand, both the Fifth and Ninth Circuits have denied review of orders of the District Court dismissing the class action portion of the Complaints on the grounds that said orders do not fall within the "collateral order" exception of Section 1291 ennunciated by this Court in the *Cohen* and other cases, *supra,* and are barred under the "death knell" doctrine of the *Eisen* case, *supra,* as circumscribed.

See *Hackett* v. *General Host Corporation, supra,* where the Third Circuit in a 2 to 1 decision held, that absent certification for immediate appeal or a final judgment dismissing the complaint, that the District Court's order dismissing the class count was an unappealable interlocutory order, not appealable either under the "death-knell" doctrine of the Second Circuit or the "collateral order"

rationale of *Cohen* v. *Beneficial Industrial Loan Corp., supra.* The majority decision took the view that interlocutory appellate review of Rule 23 class action determinations should be restricted to Section 1292 (b), Rule 54 (b) or mandamus routes, rather than to grant *interlocutory review as a matter of right* under the collateral order doctrine of the *Cohen* case, *supra.* The dissenting opinion, by Judge Rosen, held that the order met the collateral order test of the *Cohen* case, *supra,* and was a final appealable order within the purview of Section 1291.

Compare with *Weingartner* v. *Union Oil Company of California,* 431 F.2d 26 (9th Cir. 1970), where the District Court had dismissed a class action count of an antitrust suit brought by five gasoline service station dealers, and where the District Court refused to certify the case for interlocutory appeal pursuant to 28 U.S.C. Sec. 1292 (b). Here the Ninth Circuit denied review on the grounds that the case did not fall within the purview of either the "death knell" doctrine or the collateral order doctrine of the *Cohen* case, *supra,* taking the position that the class action did not deal with rights collateral to the merits of the lawsuit, and did not create an irreparable hardship on plaintiffs since their claims were substantial.

In *Songy* v. *Costal Chemical Corporation,* 469 F.2d 709 (5th Cir. 1972), the Fifth Circuit in denying review of a District Court order dismissing the class action portion of a complaint seeking to recover damages and to obtain injunctive relief from air and noise pollution activities of a defendant chemical manufacturing plant, followed the "death knell" doctrine, and refused to apply the "collateral order" exception of Section 1291 ennunciated by this Court in the *Cohen* case, *supra.*

The Seventh Circuit in holding, in the instant cause, that the District Court's order denying plaintiff's motion to confirm the cause as a class action pursuant to Rule 23, and dismissing the class action count (Count V), was not an appealable order, did so without any attempt to determine whether the facts of this case met the tests of "finality" mandated by the Supreme Court in the *Cohen* case, *supra,* and without recognizing, or even analyzing, the obvious differences that exist in applying the tests of the *Cohen* case, *supra,* to a situation where the District Court's order *sustained* the maintenance of the class action, as in the *Thill Securities Corp.* v. *New York Stock Exchange,* 469 F.2d 14, 17 (7th Cir. 1972) case cited by the Seventh Circuit in its within decision.

For in the *Thill* case, *supra,* the order sustaining the class action did not irreparably affect the basic rights of a party, and such rights do not run the risk of being irreparably lost by delay, or confronted with problems of multiplicity of lawsuits and the tolling of the Statute of Limitations. In the instant cause, on the other hand, in applying the tests of the *Cohen* case, *supra,* the consequences, as heretofore pointed out, in terms of the District Court's order having an irreparable affect on the basic rights of a party, are quite different.

The Seventh Circuit in holding, in the instant cause, that the District Court's order was not an appealable one, did not discuss or even refer to the "collateral order" doctrine ennunciated by the Supreme Court of the United States in the *Cohen* case, *supra,* and followed in subsequent decisions of the Supreme Court, delineating what is an appealable order under Section 1291. Nor did it ground its decision on the "death knell" doctrine. Instead it chose to base its ruling on the ground that appropriate relief

was available under 28 U.S.C. Sec. 1292 (b). This would make the right of appeal, to review the order of a District Court dismissing the class action count of a Complaint, not one of right within the purview of Section 1291, but purely discretionary since Section 1292 (b) appeals are purely discretionary. Under Section 1292 (b), the District Court Judge, from whose order or judgment it is sought to appeal from, must in the first instance, if the appeal is to be allowed, certify that the "order involves a controlling question of law as to which there is substantial ground for difference of opinion and that any immediate appeal from the order may materially advance the ultimate order" (a formidable hurdle if the District Court Judge, in all objectivity, refuses to entertain the thought that he may be in error). And even if such certification is given by the District Court Judge, the entertainment of such an appeal by the Court of Appeals is purely discretionary. Absent an affirmative exercise of both of these discretionary determinations by the District Court Judge and the Court of Appeals, there is no right of appeal under Section 1292 (b). A litigant seeking judicial review of important and valuable Federal rights, and the deterrent enforcement of the antitrust laws via a class action under Rule 23, is thus required to run the gauntlet of two barriers to judicial review, with no assurance that he will be able to obtain such review. Section 1292 (b) is, at best, a dubious and questionable solution to the problem here presented for review.

The attention of this Honorable Court is directed to a very excellent Note Annotation entitled as *"Interlocutory Appeal From Order Striking Class Action Allegations"*, appearing in 70 Columbia Law Review 1292 (1970), which contains an excellent analysis of the question and

problem here presented for review. Referring to the problems presented by relying on Section 1292(b) as a means of obtaining review of an order dismissing a class action count, whether such an order meets the "collateral" order test ennunciated by this Court in the *Cohen* and other cases, *supra,* and the need and desirability of affording a right to appeal under Section 1291, the author of said Note Annotation says (at pages, 1296-1297, 1303 and 1304) as follows:

> "These are, however, practical difficulties in applying for certification to the very court that ordered the class action stricken. The court may quite understandably be less than sympathetic to plaintiff's claims of error or, alternatively, it may genuinely believe that its order did not involve the requisite 'controlling questions of law.' Courts generally have been restrictive in their approach to finding such 'controlling' questions,[31] and this seems particularly true in class action situations.[32] A court, for example, may believe that its order is justified by a discretionary provision of rule 23, such as that requiring a class action to be superior to other available methods of adjudication, and that the application of section 1292(b) is, therefore, inappropriate. Or a court may simply believe that at worst it made an 'incorrect evaluation of proper factors';[33] such an error may be reversible but it does not constitute a controlling question of law.[34]
>
> "More importantly, there is a serious question, despite some contrary earlier opinion,[35] whether section 1292(b) is designed to provide for review of this type of order. The cases suggest that the requirement that 'immediate appeal . . . may materially advance' the litigation's termination means that the order must involve the critical issue in [the] case[36] and that it must have some potential for affecting the court's determination of the merits.[37] Class action orders, rarely doing either, would thus appear unsuit-

able for section 1292(b) treatment. Moreover, it has been thoughtfully suggested by Professor Wright that the phrase 'not otherwise appealable' excludes so-called 'collateral orders', since they were appealable prior to the enactment of section 1292(b) in 1958.[28] If class action orders are 'collateral', as will be argued below, appeal as of right would exist independently and exclusively of the 1958 act."

• • •

"Viewed in these terms, an order striking class action allegations seems to present a classic 'collateral' order situation. The right of the named plaintiff to represent an alleged class is clearly distinct from, and independent of, the merits of his claim and the question whether he has that right will generally be separable from the factual issues necessarily to be determined at trial. • • •

The decision on the class action question would not be further illuminated by a trial on the merits. It would accordingly, under the *Cohen* standard, be ripe for review had the decision been against the maintenance of the class action."

• • •

"There are many situations, not yet recognized by the courts, which justify giving a plaintiff the right to interlocutory appeal from an order striking rule 23 (b)(3) class action allegations from his complaint. Confronted with such an order, a plaintiff's right to immediate review should not be limited to those instances where he can demonstrate that, as a practical matter, the order sounds the 'death knell' of his action. Nor should he be required to follow a circuitous avenue in search of a discretionary appeal. If he can demonstrate that the order is ripe for appeal, that it is important to the future conduct of the litigation, and that it will not merge even with a favorable judgment, the plaintiff should be afforded a right to appeal under the practical construction long given section 1291 by the Supreme Court. Affording the plain-

> tiff such a right to appeal would not only be consistent with the policy of the final judgment rule: it would also further the development of the significant and potentially far-reaching procedural device provided by rule 23(b)(3)."

The substantive issue sought to be reviewed in the Court of Appeals is important enough to deserve review, whether brought as a matter of right under U.S.C. Sec. 1291 and the collateral order doctrine of the *Cohen* case, *supra,* or by way of Mandamus under 28 U.S.C. Sec. 1651 (which the Seventh Circuit in its decision completely ignored despite petitioner-plaintiff's request, in the alternative, that petitioner-plaintiff's Notice of Appeal, and brief in the Court of Appeals, stand as a Petition for Writ of Mandamus).

For the reasons heretofore advanced, it is time, it is respectfully suggested, for the Supreme Court of the United States to bring *"enlightenment"* (as twice in effect requested by Chief Judge Friendly of the Second Circuit) and its definitive judgment to the very important issue here presented for review by the within Petition for Writ of Certiorari.

CONCLUSION

Wherefore, for the reasons hereinabove advanced, Petitioner respectfully prays that this Petition for a Writ of Certiorari should be granted, and, upon hearing, that the order of May 18, 1973, of the Court of Appeals for the Seventh Circuit, dismissing Petitioner-Plaintiff's Appeal for want of jurisdiction, be reversed, and this cause remanded to said Court of Appeals with directions to review the merits of said Petitioner-Plaintiff's Appeal; and that Petitioner have such other and further relief as this Honorable Court may deem meet.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604
May 18, 1973

Before
Hon. WALTER J. CUMMINGS, Circuit Judge
Hon. JOHN PAUL STEVENS, Circuit Judge
Hon. ROBERT A. SPRECHER, Circuit Judge

EDWARD Q. LUPIA, individually, etc.,
Plaintiff-Appellant,
No. 73-1026
vs.
STELLA D'ORO BISCUIT CO., INC.,
Defendant-Appellee.

FRANK A. GARZA, etc.,
Plaintiff-Appellant,
No. 73-1012
vs.
CHICAGO HEALTH CLUBS, INC., et al.,
Defendants-Appellees.

MARSHALL WINOKUR, et. al.,
Plaintiffs-Appellants,
No. 72-2029
vs.
BELL SAVINGS AND LOAN ASSOCIATION, et al.,
Defendants-Appellees.

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 72 C 738 ....
PHILIP W. TONE, Judge

No. 71 C 643
RICHARD W. MCLAREN, Judge

No. 70 C 1177
WILLIAM J. BAUER, Judge

ORDER

These three cases involve the much disputed question whether the dismissal of a class action portion of a complaint is appealable. In *Thill Securities Corp.* v. *New York Stock Exchange,* 469 F.2d 14, 17 (7th Cir. 1972), we held that the denial of a motion to strike a class action was not an appealable order under 28 U.S.C. §1291. We now hold that the present orders are not appealable, necessitating the dismissal of the three appeals for lack of jurisdiction.

In so holding, we follow *Hackett* v. *General Host Corp.,* 455 F.2d 618 (3d Cir. 1972), certiorari denied, 407 U.S. 925; Gerstle v. Continental Airlines, Inc., 466 F.2d 1374 (10th Cir. 1972); and our analogous prior decision in *Jumps* v. *Leverone,* 150 F.2d 876 (7th Cir. 1945). If the interlocutory appeals route of 28 U.S.C. § 1292(b) had been successfully followed, review would be available. 9 Moore's Federal Practice ¶ 110.13[9] p. 184 (2d ed. 1972).

Appeals dismissed.

APPENDIX B

UNITED STATES DISTRICT COURT
Northern District Of Illinois
Eastern Division

EDWARD Q. LUPIA, individually, and for and on behalf, pursuant to Rule 23 of the Federal Rules of Civil Procedure, of other distributors of Stella D'Oro Biscuit Co., Inc., a New York corporation, similarly situated, as a class,
Plaintiff(s),

v.

STELLA D'ORO BISCUIT CO., INC., a New York corporation,
Defendant.

No. 72 C 783

MEMORANDUM OF DECISION

This is an antitrust class action seeking injunctive relief and treble damages brought by a former exclusive distributor of the defendant, Stella D'Oro Biscuit Co., Inc., a New York corporation engaged in the manufacture and sale of cookies, biscuits and breadsticks, on behalf of himself and other distributors. The plaintiff, Lupia, is a citizen of Illinois whose recently terminated distributorship embraced the northeastern Illinois area, including the Chicago Metropolitan Area, as well as parts of southern Wisconsin, northern Indiana and southern Michigan.

Plaintiff's distributorship was "exclusive" in that he was contractually barred from selling baked products other than Stella D'Oro's and from selling outside the territory assigned to him by the agreement. The complaint alleges violations of Sections 2(a) and 2(c) of the

Robinson-Patman Act, Section 1 of the Sherman Act and Section 3 of the Clayton Act, all growing out of the exclusive distributorship arrangement and pricing practices of the defendant.

The defendant has moved to dismiss the complaint on the grounds of improper venue and lack of personal jurisdiction and, in the alternative, has moved to transfer the action to the Southern District of New York under 28 U.S.C. § 1404(a). Defendant also moves that plaintiff's claims, or alternatively those claims to the extent that they relate to antitrust violations prior to March 22, 1968, be declared barred by the statute of limitations. Plaintiff has moved that the cause be confirmed as a class action under Rule 23. Defendant opposes this motion, and in addition, has moved for a rule to show cause why Lupia should not be held in contempt for allegedly violating Rule 22 of this Court's local rules, which proscribes communications to class members without court approval. The show cause order has issued and been answered, and a determination can be made without a hearing. This memorandum addresses itself to all these matters presently before the Court.

I. *Contempt*

The rule to show cause can be disposed of quickly. Rule 22 of the local rules of this Court provides in part:

> "In every potential and actual class action under Rule 23, F. R. Civ. P., all parties thereto . . . are hereby forbidden, directly or indirectly, orally or in writing, to communicate concerning such action with any potential or actual class member not a formal party to the action without the consent of and approval of the communication by order of the Court."

The complaint in this action was filed on March 22, 1972. The class which Lupia purports to represent in his complaint includes all distributors of Stella D'Oro, exclusive

and non-exclusive, current and former. On or about April 13, without leave of the Court, Lupia sent a copy of the complaint with an accompanying letter of transmittal to four of defendant's distributors who Lupia says are "friends." The letter indicates that the plaintiff is suing on behalf of other distributors and is seeking treble damages. It asks for "cooperation."

The purpose of local Rule 22 is to prevent the solicitation of litigation, or of fees or expenses, from members of the potential class not formal parties to the suit and to prevent misrepresentation of the status, purposes and effects of the action. Lupia's communications may or may not have been an attempt to solicit more active participation from potential class members. In any event, they were obviously improper since they were sent without the Court's permission. Nevertheless, in view of the plaintiff's affidavit that he was completely unaware of the rule, and his counsel's representation in his answer to the rule to show cause that there have been no other improper communications and, implicitly, that there will be none, and in view of the fact that there seems to have been little, if any, resulting prejudice to the defendant in conducting his defense to the suit, the plaintiff has purged himself of any contempt of court, and the rule is discharged.

II. *Venue*

Venue in this action is governed by Section 12 of the Clayton Act, 15 U.S.C. §22:

> "Any suit, action, or proceeding under the Antitrust Laws against a corporation may be brought not only in the judicial district whereof it is an inhabitant, but also in any district where it may be found or transacts business; and all process in such cases may be served in the district of which it is an inhabitant, or wherever it may be found."

Stella D'Oro is not licensed, does not own real estate or personal property and does not maintain an office, tele-

phone or bank account in Illinois. All contracts are negotiated and signed in New York, where all the corporate records are kept. Production, sales and advertising personnel and operations are all in New York, with the exception of two sales representatives who live in Illinois and who service distributors in the Midwest with marketing assistance and technical advice. Sales to customers outside New York are technically made and delivered in New York. Nevertheless, sales by the defendant to customers in Illinois for each of the five years from 1967 to 1971 have approached $1 million and have constituted between six and eight per cent of Stella D'Oro's annual gross sales nationally. Almost all of those sales were to the plaintiff in the Northern District of Illinois. That certainly constitutes business "of any substantial character" measured according to a "practical, nontechnical, business standard," which is the test for the phrase "transacting business" in 15 U.S.C. § 22, *United Statess* v. *Scophony Corp.*, 333 U.S. 795, 808 (1948), *ABC Great States, Inc.* v. *Globe Ticket Company*, 310 F. Supp. 739 (N.D. Ill. 1970). The facts that the sales contracts were signed in New York and delivery was made there are not controlling in view of the other substantial commercial contacts with this district. Cf. *State of Illinois* v. *Harper & Row Publishers, Inc.*, 308 F. Supp. (N.D. Ill. 1969). The defendant's sales into the district have been substantial and continuous and are enough to make it amenable to suit here under the intentionally loose venue standards of the Clayton Act. The presence of resident supervisors and sales representatives in the district to assist in the marketing of Stella D'Oro products and a radio, television and newspaper advertising campaign in the Chicago Metropolitan Area are additional factors compelling the conclusion that the defendant is transacting business within the district. Venue is therefore properly laid here.

The defendant next urges that the cause be transferred to the Southern District of New York, where its books, records and witnesses are all located. It claims that all

the relevant agreements and documentation in the case are there, and that, of the proposed class of plaintiff-distributors, the great majority live closer to New York than to Chicago. Inconvenience to both the defendant and most of the class plaintiffs would be greatly lessened, it suggests, by a transfer.

On the other hand, the plaintiff alleges that the acts which he claims violated the antitrust laws as to him occurred in or are related to activities within this district, and represents that his witnesses will largely be drawn from here and the surrounding Midwest geographical area. He thus asserts that a transfer would make it impossible to use compulsory process and financially difficult to present willing witnesses to a New York court, and generally would place an onerous financial burden upon him.

In passing on a defendant's motion for transfer under 28 U.S.C. § 1404(a), the plaintiff's choice of forum must be given great weight, especially when the plaintiff is a resident of the forum chosen by him and many of the acts of which he complains operated upon him within the forum district. The defendant here has not met his heavy burden of showing more than a bare balance of convenience in his favor. The conclusory averments in his affidavits do not indicate in the required detail how Stella D'Oro would be inconvenienced if trial were held in Chicago. The defendant's motions to dismiss for improper venue and to transfer the cause to the Southern District of New York are denied.

III. *Statute of Limitations*

The complaint in this case was filed on March 22, 1972. 15 U.S.C. § 15 (b) provides that an action is "forever barred unless commenced within four years after the cause of action accrued." Generally, a cause of action accrues and the statute begins to run when a defendant commits an act that injures a plaintiff's business. *Zenith Radio Corp.* v. *Hazeltine Research,* 401 U.S. 321, 338 (1971). Where a continuous course of unlawful conduct

or a continuing conspiracy is alleged, a cause of action accrues when "a plaintiff feels the adverse impact" of each invasion of his rights. *Id.* at 339. The injurious impact of each new overt act in the course of illegal conduct creates a new cause of action for which damages may be recovered. *Weber* v. *Consumers Digest, Inc.*, 440 F. 2d 729, 731 (7th Cir. 1971).

The defendant contends that plaintiff's action essentially complains of only two overt acts which caused him injury: The execution of two contracts, one in 1961 and the other in 1963, containing the terms of the manufacturer-relationship between the plaintiff and defendant. Therefore, defendant argues, the cause of action accrued in 1963 and is barred by the statute of limitations. Plaintiff contends that it is not the agreements themselves but a continuous course of conduct, practices and acts of the defendant subsequent to them which are the overt acts which violate the antitrust laws and have caused him injury in the four year period since March 22, 1968. He argues that a claim for damages caused by those acts is therefore not barred by the statute of limitations.

The actions of which Lupia complains include Stella D'Oro's granting and paying discriminatory discounts of five per cent to chain store retailers and forcing Lupia to absorb them; granting and paying discounts to some of its other distributors higher than the discount which it granted and paid to Lupia; barring its exclusive distributors from selling the products of other bakery manufacturers, whether competitive or not, during the terms of the distributorship and thereafter for one year, pursuant to the relevant provision of the distributorship agreement; allowing plaintiff and other distributors, contrary to the provisions of the distributorship agreement, to sell bakery products of other bakery manufacturers so long as they bought them from Stella D'Oro, which bought the competing products at a price lower than that at which it resold them; and fixing the price of its products at retail outlets.

There are, accordingly, allegations of a course of conduct beginning with and either premised upon or related in some way to the 1961 and 1963 agreements, but continuing through the years until 1971. It is to be noted that one alleged violation, allowing plaintiff to handle products manufactured by other manufacturers if plaintiff bought them through defendant, is inconsistent with the terms of the agreements and cannot be said to depend upon them. To the extent that plaintiff can prove overt acts which caused him injury in the period between March 22, 1968 and March 22, 1972, he would be entitled to damages for that injury.

The cases cited by the defendant himself require this interpretation of the statute of limitations period. *See Weber* v. *Consumers Digest, Inc.*, 440 F.2d 729 (7th Cir. 1971) and *Baker* v. *F. & F. Investment*, 420 F. 2d 1191 (7th Cir. 1970), both written by Judge Cummings. Although *Weber* merely holds that it is "well settled that the period of this statute of limitations commences to run from the last overt act of the conspiracy," at 731, *Baker* makes clear that, in the context of a continuing contractual relationship between plaintiff and defendant analogous to the one we have here, the "overt acts" continue for as long as the relationship continues:

> "Plaintiffs have alleged wrongs committed by defendants which continue during the entire lives of the individual purchase contracts. . . . [The] continuing relationship with individual plaintiffs . . . constituted a prolonged and continuing invasion of the rights of the purchasers. . . . [T]he limitations periods commence to run from the last overt act of the conspiracy, permitting plaintiffs to recover 'for damages suffered within the damages period as a result of an overt act repetitious of the unlawful pre-[limitation] period acts occuring in the damage period' (citation omitted). Here the defendants have entered into a series of contracts which manifest an on-going relationship between the individual participants and con-

stituting the alleged invasion of the rights of the plaintiffs." At 1200.

Emich Motors Corp. v. *General Motors Corp.*, 229 F. 2d 714 (7th Cir. 1956) and *Baldwin* v. *Loew's, Inc.*, 312 F. 2d 387 (7th Cir. 1963) are distinguishable for the reasons set out in *Baker, supra,* at 1200.

Plaintiff contends, finally, that he should be able to recover for injuries suffered in the years prior to March 22, 1968 because of the doctrine of fraudulent concealment. Plaintiff's complaint does not allege that defendant concealed from him or that he lacked knowledge of the facts disclosing the discriminatory sales practices upon which the case rests. The allegations of concealment are raised in the affidavit accompanying plaintiff's memorandum in opposition to the motion to dismiss. Defendant argues that the affidavit is an improper method of raising the allegations of fraudulent concealment and is untimely, an argument which I reject on the authority of *Zenith Radio Corp.* v. *Hazeltine Research,* 401 U.S. 321, 334-335 (1971) and *Baker, supra,* at 1198, 1200.

The claim of fraudulent concealment, however, is largely implausible. Counts I and II of the complaint show on their face that the acts alleged were necessarily known to plaintiff. He knew he was being required to absorb the five per cent discount given to chain accounts. He knew he was prohibited by paragraph Seventh of the agreement from dealing in the products of other manufacturers, and he likewise knew that defendant excused his performance under that provision as to certain products he was allowed to buy through defendant. He may not have known the amount of the mark up defendant took on these products, but it is inconceivable, and a careful reading of plaintiff's affidavit shows it does not allege, that he was unaware that defendant took any mark up. The assertion in the affidavit that defendant had agreements with the other manufacturers that they would not sell to plaintiff directly, and plaintiff was unaware of these arrangements, is hardly enough to toll the statute in view of the express

prohibition in paragraph Seventh, of which plaintiff had to be aware. It does not appear from the complaint that damages, as opposed to injunctive relief, are sought for vertical price fixing, which also would necessarily have been known to plaintiff. The only acts alleged in the complaint that could have been fraudulently concealed are the discriminatory discounts to other dealers. As to these, the statute of limitations may not apply.

The motion to dismiss because of the bar of the statute of limitations is denied. At trial, plaintiff can recover damages for injuries shown to be suffered in the period from March 22, 1968 to March 22, 1972 by reason of unlawful acts of the defendant from 1961 to 1971. If he can demonstrate that the defendant fraudulently concealed the price discrimination alleged in Count III, plaintiff may recover for injuries resulting from those violations suffered in the years prior to March 22, 1968.

IV. *The Class Action*

Plaintiff seeks to represent a class comprised of 34 current exclusive distributors of defendant, 56 current nonexclusive distributors, 13 former exclusive and two former nonexclusive distributors whose distributorships were in effect within the four year period immediately preceding the filing of suit on March 22, 1972, and such other presently undisclosed distributors as would qualify as members of the above categories.

In response to defendant's cogent legal attack upon the appropriateness of that class, plaintiff suggests in his reply brief that the Court consider a more tightly knit class consisting of the 34 current and 13 former exclusive distributors. Neither of these suggested classes meets the requirements of Rule 23(a) (4), which allows a class member to sue on behalf of the class only if his interests are similar enough to the interests of the class to assure the Court that he can properly represent them. Where, as here, a former distributor seeks to represent both current and former distributors in a class action, he bears

a heavy burden of convincing the Court that he can properly represent the current distributors. *Free World Foreign Cars* v. *Alpha Romeo*, CCH Trade Reg. Reporter, ¶ 73,925 (D.C.N.Y. 1972), *Gaines* v. *Budget Rent-A-Car*, CCH Trade Reg. Reporter, ¶ 73,860 (N.D. Ill. 1972). The burden is heavy because of the strong possibility that the current distributors are profiting from the conduct which is alleged to be unlawful and if left to their own initiative would not attack it in the courts. The former distributors who are no longer engaged in business relations with the manufacturer have nothing to lose from the lawsuit, and as a result their interests may well be antagonistic to the interests of the current distributors. The interests are even more likely to be antagonistic when, as in the instant case, the plaintiff former distributor alleges that he was well acquainted with some of the allegedly unlawful activities of the manufacturer during the term of his distributorship. Yet he refrained from suit during that entire eight or ten year period when he enjoyed profitable commercial relations with Stella D'Oro. We are left with the strong inference that when Lupia himself was a current distributor, he was not disposed to challenge the conduct of his manufacturer which he now suggests is unlawful, and that many if not most of the current distributors in the proposed classes would likewise not be disposed to bring suit if left to their own devices. The inference that the current distributors have antagonistic interests is strengthened by the observation that not one has intervened in the action up to now.

Lupia is therefore left with a class of 13 former exclusive distributors and two former nonexclusive distributors. Passing the question whether exclusive and nonexclusive distributors have similar interests in the action, this class clearly is not "so numerous that joinder of all members is impracticable." Rule 23(a) (1)). *See Swanson* v. *American Consumer Industries, Inc.*, 288 F. Supp. 60 (S.D. Ill. 1968); *Moore's Fed. Practice*, 23.05. While the required numerosity may not be merely a matter of sheer

quantitative measurement, the circumstances here, including the sizable amount which would be claimed by each individual plaintiff ($700,000 for Lupia), suggest that joinder of all former distributors who wish to sue would not be impracticable.

Plaintiff's motion that the cause be confirmed as a class action is denied and Count V of his complaint, which separately asserts the class action allegations, is therefore dismissed. Defendant's motions to dismiss are denied and the rule to show cause is discharged, in accordance with the views expressed above.

/s/ Philip W. Tone
United States District Judge

Dated: November 2, 1972

INDEX

	PAGE
Opinions Below	1
Jurisdiction	1
Statutes and Rules Involved	2
Issues Presented	2
Statement of the Case	3
Statement of Facts	4
Argument	5
I. THE PETITION FOR CERTIORARI SHOULD BE DENIED SINCE NO GROUND EXISTS FOR THE GRANTING OF THE WRIT	5
A. The Courts Of Appeal Have Uniformly Held That An Order Denying The Maintenance Of An Action As A Class Action Is Interlocutory And Not Appealable Under The Circumstances Of This Case	6
B. The Dismissal Of The Appeal Is In Conformity With Applicable Decisions Of This Court And With Federal Statutes	8
II. THERE IS NO BASIS IN LAW OR EQUITY FOR GRANTING OF WRIT OF MANDAMUS	13
Conclusion	14

CITATIONS

Cases

PAGE

Supreme Court Decisions:

Baltimore Contractors, Inc. v. Bodinger, 348 U.S. 176 (1955) 6

Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541 (1949) 8

LaBuy v. Howes Leather Co., 352 U.S. 249 (1957) 13

Magnum v. Coty, 262 U.S. 159 (1923) 5

Schlagenhauf v. Holder, 379 U.S. 104 (1964) 13

Will v. United States, 389 U.S. 90 (1967) 13

Court of Appeals Decisions:

Allegheny Airlines, Inc. v. LeMay, 448 F.2d 1341 (7th Cir. 1971) 11, 13

Borden Co. v. Sylk, 410 F.2d 843 (3rd Cir. 1969) 11

Caceres v. International Air Transport Association, 422 F.2d 141 (2d Cir. 1970) 7, 8, 9

City of New York, v. Int'l Pipe and Ceramics Corp., 410 F.2d 295 (2d Cir. 1969) 7, 8, 9, 10

Donlon Industries, Inc. v. Forte, 402 F.2d 935 (2d Cir. 1968) 10

Eisen v. Carlisle & Jacquelin, 370 F.2d 119 (2d Cir. 1966) *cert. denied* 386 U.S. 1035 (1967) 7

Gosa v. Securities Investment Company, 449 F. 2d 1330 (5th Cir., 1970) 7, 8

Green v. Wolf Corp., 406 F.2d 291 (2d Cir. 1968), *cert. denied* 395 U.S. 977 (1969) 7

PAGE

Hackett v. General Host Corporation, 455 F.2d 618 (3d Cir.) *cert. denied* 407 U.S. 925 (1972) 7, 8, 10, 11, 12, 14

Hartford Fire Ins. Co. v. Herrald, 434 F.2d 638 (9th Cir. 1970) 9, 11

Jumps v. Leverone, 150 F.2d 876 (7th Cir. 1945) ..7, 8, 10

Korn v. Franchard, 443 F.2d 1301 (2d Cir. 1971) 10

Lipsett v. United States, 359 F.2d 956 (2d Cir. 1966) 7, 8

Milburg v. Western Pacific Railroad Company, 443 F.2d 1301 (2d Cir. 1971) 7, 8

New England Power Co. v. Asiatic Petroleum, 456 F.2d 183 (1st Cir. 1972) 11

United States v. Fried, 386 F.2d 691 (2d Cir. 1967) .. 11

Weight Watchers of Phil. v. Weight Watchers Int'l, 455 F.2d 770 (2d Cir. 1972) 10, 14

Weingartner v. Union Oil of California, 431 F.2d 26 (9th Cir. 1970) 7, 8, 9

STATUTES:

28 USC §1291 .....2, 4, 6, 7, 12

28 USC §1292 .....2, 4, 6, 11, 12, 13

28 USC §1651 .....2, 13

RULES:

United States Supreme Court Rule 19 ..... 2, 5

Rule 23, Federal Rules of Civil Procedure 2, 3, 9, 10, 14

Rule 54(b), Federal Fules of Civil Procedure 4, 11, 12

Rule 21, Federal Rules of Appellate Procedure 2, 13

MISCELLANEOUS:

9 Moore's Federal Practice ¶s 110.10, 110.22[5], 110.26-30 .....11, 13

In the Supreme Court of the United States

No. 73-307

EDWARD Q. LUPIA, individually and for and on behalf, pursuant to Rule 23 of the Federal Rules of Civil Procedure, of other distributors of Stella D'Oro Biscuit Co., Inc., a New York corporation, similarly situated, as a class,

Petitioner,

vs.

STELLA D'ORO BISCUIT CO., INC., a New York corporation,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court of Appeals for the Seventh Circuit.

BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinions of the United States District Court for the Northern District of Illinois and the United States Court of Appeals for the Seventh Circuit are unreported, but are set forth in full in Appendix A and B of the Petition.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

STATUTES AND RULES INVOLVED

The pertinent provisions of the United States Code, the United States Supreme Court Rules, and the Federal Rules of Civil Procedure are set forth as follows:

United States Code:

28 U.S.C. § 1291 (p. 4 of Petition)

28 U.S.C. § 1292 (Appendix A to this responsive brief)

28 U.S.C. § 1651 (p. 5 of Petition)

United States Supreme Court Rules:

Rule 19 (Appendix B to this responsive brief)

Federal Rules of Civil Procedure:

Rule 23 (pp. 5-6 of Petition)

Federal Rules of Appellate Procedure:

Rule 21 (Appendix C to this responsive brief)

ISSUES PRESENTED

1. May a plaintiff, having an individual claim in excess of $700,000, appeal pursuant to 28 U.S.C. §1291 from an interlocutory order denying plaintiff's motion that the action be confirmed as a class action and dismissing the class action count from the complaint.

2. Must an appellate court take jurisdiction pursuant to 28 U.S.C. §1651 by treating a notice of appeal as a petition for mandamus from an interlocutory order when the requisites of Rule 21 of the Federal Rules of Appellate Procedure have not been met, no abuse of discretion or usurpation of power by the district judge is alleged and an appeal is available pursuant to 28 U.S.C. 1292(b).

STATEMENT OF THE CASE

This action was commenced by a Complaint brought in the name of Petitioner, Edward Q. Lupia, individually and for and on behalf of other distributors of Stella D'Oro Biscuit Co., Inc., similarly situated as a class, pursuant to Rule 23 of the Federal Rules of Civil Procedure. The Complaint consists of five counts. Counts I through IV describe separate alleged violations by Respondent of the Federal Antitrust Laws and seek treble damages therefor in the aggregate amount of $702,523.37 on behalf of the Petitioner, individually. Count V realleges Counts I through IV as a class action on behalf of all present and former distributors of Respondent, stating no specific dollar amount of damages.

Petitioner moved in the district court that the case be confirmed and proceed as a class action, pursuant to Rule 23 of the Federal Rules of Civil Procedure. Respondent, *inter alia,* moved to dismiss the Complaint on the ground of improper venue and lack of *in personam* jurisdiction, or, in the alternative, to transfer the action to the United States District Court for the Southern District of New York. On the basis of the motions, briefs and arguments filed with the district court, the court ruled on November 2, 1972, in a memorandum decision, *inter alia,* that:

> "Plaintiff's [Petitioner's] motion that the cause be confirmed as a class action is denied and Count V of his Complaint which separately asserts the class action allegations, is therefor dismissed. Defendant's [Respondent's] motions to dismiss are denied and the rule to show cause is discharged, in accordance with the views expressed above." (Appendix B to Petition at p. 12(b))

On November 15, 1972, Petitioner filed a notice of appeal to the district court's dismissal of its class action. Petitioner did not seek to have the ruling determined as final pursuant to Rule 54(b) of the Federal Rules of Civil Procedure or request certification pursuant to 28 U.S.C. §1292(b). Instead, Petitioner claimed that he had an absolute right to appeal the order on the grounds that it was a "final and appealable order within the purview of 28 U.S.C. §1291." Respondent moved to dismiss the appeal on the ground that the Court of Appeals did not have jurisdiction over the subject matter pursuant to 28 U.S.C. §1291. On May 18, 1973, the United States Court of Appeals for the Seventh Circuit dismissed said appeal for want of jurisdiction on the ground that the order appealed from was not an appealable order. In so holding, the Court of Appeals stated: "If the interlocutory appeals route of 28 U.S.C. §1292(b) had been successfully followed, review would be available. [citations omitted]." (Appendix A to Petition at p. 2(a))

STATEMENT OF FACTS

Petitioner's statement of facts is substantially one-sided and relates more to the merits of the Complaint than to the issues presented by the Petition. A more accurate treatment of the facts is found in the opinion of the District Court. (Appendix B to Petition)

ARGUMENT

I.

THE PETITION FOR CERTIORARI SHOULD BE DENIED SINCE NO GROUND EXISTS FOR THE GRANTING OF THE WRIT.

The exercise of certiorari jurisdiction has been a frequent subject of scholarly debate and pronouncements of this Court and its justices. In *Magnum Co.* v. *Coty*, 262 U.S. 159, 163 (1923), Chief Justice Taft, in much quoted language, stated:

> "The jurisdiction [of the Supreme Court to review cases by certiorari] was not conferred upon this Court merely to give the defeated party in the Circuit Court of Appeals another hearing. Our experience shows that eighty per cent of those who petition for certiorari do not appreciate these necessary limitations upon our issue of the writ."

The Petition in the instant case falls within the category of cases referred to by Chief Justice Taft as outside the scope of Supreme Court review. The Petition does not even approach the standards for certiorari jurisdiction enumerated by this Court and by Supreme Court Rule 19. Supreme Court Rule 19 in its pertinent part provides:

> "Rule 19. Considerations governing review on certiorari.
>
> 1. A review on writ of certiorari is not a matter of right, but of sound discretion, and will be granted only where there are special and important reasons therefor. The following, while neither controlling or

fully measuring the court's discretion, indicate the character of reasons which will be considered:

* * *

(b) Where a court of appeals has rendered a decision in conflict with the decision of another court of appeals on the same matter; . . . or has decided an important question of federal law which has not been, but should be, settled by this court; or has decided a federal question in a way in conflict with applicable decisions of this court; . . ."

Petitioner seeks to bring its petition within the foregoing considerations set forth in Rule 19(b). Upon review of the applicable law, it is clear that these considerations are absent.

A. The Courts Of Appeal Have Uniformly Held That An Order Denying The Maintenance Of An Action As A Class Action Is Interlocutory And Not Appealable Under The Circumstances Of This Case.

Appeals to the Courts of Appeal are governed by 28 U.S.C. §§ 1291 and 1292. Section 1291 provides in part that:

> "The Courts of Appeal shall have jurisdiction of appeals to all *final decisions* of the district courts of the United States . . . except where a direct review may be had in the Supreme Court." (emphasis added)

This section prevents appeals from any decision which is tentative, informal or incomplete as long as the case at bar remains open, unfinished or inconclusive. The purpose of the statute is to combine into one proceeding all the matters that may effectively be reviewed if and when final judgment occurs so as to avoid piece-meal appeals *Baltimore Contractors, Inc.* v. *Bodinger*, 348 U.S. 176 (1955).

Petitioner in the instant case claims that he has an absolute right under 28 U.S.C. § 1291 to appeal an order dismissing the class action even though he is left with an individual pending claim in excess of $700,000. Each of the numerous Courts of Appeal which have considered the question has held that a district court's interim order determining that an action may not be maintained as a class action is not a final and appealable order, at least where plaintiff is left with a substantial individual claim, *Gosa* v. *Securities Investment Company,* 449 F.2d 1330 (5th Cir. 1971), *Caceres* v. *Int'l Air Transport Ass'n.,* 422 F.2d 141 (2d Cir. 1970); *Milburg* v. *Western Pacific Railroad Company,* 443 F.2d 1301 (2d Cir. 1971); *City of New York* v. *Int'l Pipe and Ceramics Corp.,* 410 F.2d 295 (2d Cir. 1969); *Weingartner* v. *Union Oil of California,* 431 F.2d 26 (9th Cir. 1970); *Hackett* v. *General Host Corporation,* 455 F.2d 618 (3rd Cir.) *cert. denied* 407 U.S. 925 (1972); *Jumps* v. *Leverone,* 150 F.2d 876 (7th Cir. 1945); *Lipsett* v. *United States,* 359 F.2d 956 (2d Cir. 1966). In no decision cited by Petitioner or found by Respondent has it been suggested that a class action denial may be directly appealed under such circumstances.

A narrow exception to the final judgment rule has been carved by some Circuits for cases in which a plaintiff's individual claim is so small that denial of his class action appeal would signal the "death knell" of the litigation.[1] Other Circuits reject this exception and hold that a denial of a class action is not appealable under any circumstances.

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[1] $70 claim, *Eisen* v. *Carlisle & Jacquelin,* 370 F.2d 119 (2d Cir. 1966) *cert. denied,* 386 U.S. 1035 (1967); $1,000 claim, *Green* v. *Wolf Corp.,* 406 F.2d 291 (2d Cir. 1968) *cert. denied,* 395 U.S. 977 (1969); *contra* where plaintiff had $150,000 claim; *Caceres* v. *Int'l Air Aransport Ass'n.,* 422 F.2d 141 (2d Cir. 1970).

e.g. Hackett v. *General Host Corporation,* 455 F.2d 618 (3rd Cir.) *cert. denied* 407 U.S. 925 (1972). It should be noted that any judicial doubts expressed about the death knell rule have been in favor of narrowing or eliminating the exception, *not* toward broadening the right to appeal.

Petitioner has seized upon this exception in a clever attempt to manufacture a disagreement among the Courts of Appeal on the issues of the instant case. As Petitioner well knows, however, the Courts of Appeal are unanimous in denying such appeals where, as in this case, the plaintiff is left with a substantial individual claim, and no disagreement exists among the Circuits in either ruling or philosophy. *Gosa* v. *Securities Investment Company,* 449 F.2d 1330 (5th Cir. 1971); *Caceres* v. *Int'l Air Transport Ass'n.,* 422 F.2d 141 (2d Cir. 1970); *Milburg* v. *Western Pacific Railroad Company,* 443 F.2d 1301 (2d Cir. 1971); *City of New York* v. *Int'l Pipe and Ceramics Corp.,* 410 F.2d 295 (2d Cir. 1969); *Weingartner* v. *Union Oil of California,* 431 F.2d 26 (9th Cir. 1970); *Hackett* v. *General Host Corporation,* 455 F.2d 618 (3rd Cir.), *cert. denied* 407 U.S. 925 (1972); *Jumps* v. *Leverone,* 150 F.2d 876 (7th Cir. 1945); *Lipsett* v. *United States,* 359 F.2d 956 (2d Cir. 1956).

B. The Decision Of The Court Of Appeals Is In Conformity With The Applicable Decisions Of This Court And With Federal Statutes.

Faced with this considerable legal precedent directly on point, Petitioner attempts to justify his claim of absolute right to appeal by invoking the "collateral order" doctrine of *Cohen* v. *Industrial Beneficial Loan Corp.,* 337 U.S. 541 (1949). The *Cohen* case fashioned an exception to the finality rule for those cases where an interlocutory order, not otherwise appealable, is a final disposition of a claimed

right which was not an ingredient of the cause of action and did not require consideration with it, provided, however, that there exists an imminent need to resolve that issue lest the interests of justice be so deferred that without immediate appeal, the rights of the individual litigants will be severely prejudiced.

The *Cohen* doctrine has time and again been rejected as a basis for allowing appeal from an order denying a class action under the circumstances of our case. *Hackett* v. *General Host Corporation,* 455 F.2d 618 (3rd Cir.) *cert. denied* 407 U.S. 925 (1972); *Weingartner* v. *Union Oil Co. of California,* 431 F.2d 26 (9th Cir. 1970); *Caceres* v. *Int'l Air Transport Ass'n.,* 422 Fed. 141 (2nd Cir. 1971); *City of New York* v. *Int'l Pipe and Ceramics Corp.,* 410 F.2d 295 (2d Cir. 1969). An order refusing to permit a class action to proceed is not "collateral" in the sense demanded by the *Cohen* doctrine. See *Weingartner* and *Int'l Pipe and Ceramics Corp., supra.* Nor is such an interim order "final" and rights "irreparably lost" as required by the *Cohen* doctrine. Plaintiff's substantial claim will enable him to continue his action. Further, the order may be altered or amended by the district court at any time during the proceeding pursuant to Rule 23 (c) (1), *Caceres* and *Int'l Pipe and Ceramics Corp., supra.*[2]

---

[2] Rule 23(c)(1) provides:

> As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be maintained. An order under this subdivision may be conditional, *and may be altered or amended before the decision on the merits.* (emphasis added)

The second sentence clearly indicates that the drafters of the rule did not intend such an order to be final and immediately appealable. *Caceres* v. *Int'l Air Transport Ass'n., supra,* 422 F.2d at p. 144, n. 6.

The *Cohen* doctrine is particularly inapplicable where the question on appeal is, as in our case, the propriety of the district court's exercise of discretion. *Donlon Industries, Inc.* v. *Forte,* 402 F.2d 935 (2d Cir. 1968); *Weight Watchers of Philadelphia, Inc.* v. *Weight Watchers Int'l,* 455 F.2d 770 (2d Cir. 1972). *City of New York* v. *Int'l Pipe and Ceramics Corp.,* 410 F.2d 295 (2d Cir. 1969); *Jumps* v. *Leverone,* 150 F.2d 876 (7th Cir. 1945). As Judge Friendly said in *Weight Watchers, supra* 455 F.2d at p. 773, an important factor bearing on the application of the *Cohen* doctrine

> "[i]s whether a decision will settle a point once and for all, as it did in the *Cohen* case, or will open the way for a flood of appeals concerning the propriety of a district court's ruling on the facts of a particular suit."

Every interim order concerning the propriety of a class action under Rule 23 requires a careful review of the facts of the particular case. The trial judge must be and is allowed wide discretion in shaping his interim order to meet the facts of that particular case. Except in the case of flagrant abuse, such interim discretionary orders are not appealable. *City of New York* v. *Int'l Pipe and Ceramics Corp., supra; Jumps* v. *Leverone, supra.* To hold otherwise would be to open the courts to a flood of interim appeals concerning the district court's discretionary ruling on the facts of a particular suit at a time when the federal courts are being overwhelmed by an unprecedented number of appeals. *Hackett* v. *General Host Corporation,* 455 F. 2d 618 (3rd Cir.) *cert. denied* 407 U.S. 925 (1972); *Korn* v. *Franchard,* 443 F.2d 1301 (2d Cir. 1971).

The *Cohen* ruling emerged at a time when no alternative interlocutory appellate routes were available. Present modifications to the Judicial Code and the Federal Rules

of Civil Procedure were not yet enacted. The passage of the Interlocutory Appeals Act of 1958, which added § 1292(b) to the Judicial Code, and the 1963 amendment to Rule 54(b) provide a litigant with new means of appealing an adverse interlocutory order. In light of the statutory changes and the amendments to the Federal Rules of Civil Procedure, numerous Courts of Appeal have been reluctant to extend the *Cohen* doctrine. *New England Power Co.* v. *Asiatic Petroleum Corp.*, 456 F.2d 183 (1st Cir. 1972); *Allegheny Airlines, Inc.* v. *LeMay*, 448 F.2d 1341 (7th Cir. 1971); *Hartford Fire Ins. Co.* v. *Herrald*, 434 F.2d 638 (9th Cir. 1970); *Borden Co.* v. *Sylk*, 410 F.2d 843 (3d Cir. 1969); and *United States* v. *Fried*, 386 F.2d 691 (2d Cir. 1967). See also Professor Moore's stern warning against any extension of the *Cohen* doctrine in view of the available alternative appellate remedies. *9 Moore's Fed. Pract.* § 110.10 at pp. 135-6 and § 110.26 at p. 286. (2d ed. 1972)

Alternative appellate remedies are now more than adequate to take care of those isolated instances that merit appeal. *Hackett* v. *General Host Corporation*, 455 F.2d 618 (3rd Cir.) *cert. denied* 407 U.S. 925 (1972). The Judicial Code § 1292(b) provides for appeal where the district court certifies that the issue is a serious and unsettled question which will materially advance the litigation. Rule 54(b) of the Federal Rules of Civil Procedure allows the district court to certify as final and appealable an order that finally determines fewer than all the claims or a claim with respect to fewer than all the parties. Finally, the Petitioner may seek review by petitioning for mandamus alleging an abuse of discretion if the district judge refuses to certify the issue pursuant to the aforementioned rules.

Petitioner has made no attempt in this case to obtain district court certification pursuant to § 1292(b) or Rule

54(b). Petitioner complains, at page 25 of his petition, that he should not have to follow the route of application for certification to the district court which in the first instance denied his class action. But as the court in *Hackett* v. *General Host Corporation, supra,* pointed out 455 F.2d at p. 624:

> "We have had no indication that the district courts of this Circuit will reject applications under § 1292(b) or Rule 54(b), arbitrarily or in disregard of the policy considerations favoring, where feasible, consumer class actions warranted by federal statutes. If in isolated instances arbitrariness creeps in, there remains the ultimate remedy of mandamus."

Petitioner further complains at page 25 of his petition that certification requires the litigant to pass two barriers to judicial review "with no assurance that he will be able to obtain such review." That is certainly true. Limiting review to those situations that *merit* review is a salutary purpose of the appellate system and the very crux of these appellate remedies.

Disappointed class applicants should not be permitted to clog court dockets by merely filing a notice of appeal from interim district court orders under § 1291. If their case merits appeal, they should be required to proceed by one of the two alternative routes, 28 U.S.C. § 1292(b) or Rule 54(b) of the Federal Rules of Civil Procedure. These procedures permit the judiciary to exercise some discretion in the allowance of appeals, rather than leaving the matter entirely to the whim of disappointed class applicants. A blanket rule permitting an absolute right of appeal under § 1291 from an order denying a class action is not in the best interests of the fair and efficient administration of justice.

II.

THERE WAS NO BASIS IN LAW OR IN EQUITY FOR GRANTING A WRIT OF MANDAMUS.

Petitioner claims, in the alternative, that the Court of Appeals erred in not treating Petitioner's notice of appeal and brief as a Petition for Mandamus under 28 U.S.C. §1651. Petitioner at no time filed a formal petition for mandamus or named or served the Honorable PHILIP W. TONE, district judge, as a party to the appeal pursuant to Rule 21 of the Federal Rules of Appellate Procedure. Petitioner has not claimed that the district judge abused his discretion or that the judge was without power to rule, the critical allegation to any petition for mandamus. *LaBuy* v. *Howes Leather Co.*, 352 U.S. 249 (1957); *Schlagenhauf* v. *Holder*, 379 U.S. 104 (1964); and *Will* v. *United States*, 389 U.S. 90 (1967).

Petitioner is attempting to invoke the extraordinary writ powers of the federal appellate courts as an alternative to 28 U.S.C. 1292(b). However, mandamus will lie only if no other avenue of relief is available. As suggested by the opinion of the Court of Appeals in this case and as supported by that court's holding in *Allegheny Airlines, Inc.* v. *LeMay*, 448 F.2d 1341 (7th Cir. 1971), a certificate pursuant to 28 U.S.C. §1292(b) should first be sought before resort is had to mandamus as a method of review. See 9 *Moore's Federal Practice*, ¶110.22[5], pp. 267-268; ¶¶110.26-110.30, pp. 275-320 (2d ed., 1972) and cases cited therein.

Petitioner has cited no authority in support of his position that his notice of appeal from an order denying his motion to affirm the action as a class action should be

treated by the Court of Appeals as a Petition for Mandamus. In fact the only authority on that issue is against Petitioner. The district court's nonarbitrary exercise of discretion in issuing an interim order under Rule 23 of the Federal Rules of Civil Procedure is not subject to review by petition for mandamus. *Hackett* v. *General Host Corporation,* 455 F.2d 618 (3d Cir.) *cert. denied,* 407 U.S. 925 (1972); *Weight Watchers of Phil.* v. *Weight Watchers Int'l.,* 455 F.2d 770 (2d Cir. 1972).

CONCLUSION

Petitioner fails to show any proper ground for the granting of certiorari in the instant case. For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX A

§ 1292. Interlocutory decisions

(a) The court of appeals shall have jurisdiction of appeals from:

(1) Interlocutory orders of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, or of the judges thereof, granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court;

(2) Interlocutory orders appointing receivers, or refusing orders to wind up receiverships or to take steps to accomplish the purposes thereof, such as directing sales or other disposals of property;

(3) Interlocutory decrees of such district courts or the judges thereof determining the rights and liabilities of the parties to admiralty cases in which appeals from final decrees are allowed;

(4) Judgments in civil actions for patent infringement which are final except for accounting.

(b) When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termina-

tion of the litigation, he shall so state in writing in such order. The Court of Appeals may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: *Provided, however,* That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order. As amended Oct. 31, 1951, c. 655, § 49, 65 Stat. 726; July 7, 1958, Pub.L. 85-508, §12(c), 72 Stat. 348; Sept. 2, 1958, Pub.L. 85—919, 72 Stat. 1770.

APPENDIX B

Rule 19. Considerations Governing Review On Certiorari

1. A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor. The following, while neither controlling nor fully measuring the court's discretion, indicate the character of reasons which will be considered:

(a) Where a state court has decided a federal question of substance not therefore determined by this court, or has decided it in a way probably not in accord with applicable decisions of this court.

(b) Where a court of appeals has rendered a decision in conflict with the decision of another court of appeals on the same matter; or has decided an important state or territorial question in a way in conflict with applicable state or territorial law; or has decided an important question of federal law which has not been, but should be, settled by this court; or has decided a federal question in a way in conflict with applicable decisions of this court; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision.

2. The same general considerations outlined above will control in respect of petitions for writs of certiorari to review judgments of the Court of Claims, of the Court of Customs and Patent Appeals, or of any other court whose determinations are by law reviewable on writ of certiorari.

APPENDIX C

TITLE V. EXTRAORDINARY WRITS

CHAPTER 21

Writs of Mandamus and Prohibition Directed to a Judge or Judges and Other Extraordinary Writs

Rule 21. Writs of Mandamus and Prohibition Directed to a Judge or Judges and Other Extraordinary Writs

(a) MANDAMUS OR PROHIBITION TO A JUDGE OR JUDGES; PETITION FOR WRIT; SERVICE AND FILING. Application for a writ of mandamus or of prohibition directed to a judge or judges shall be made by filing a petition therefor with the clerk of the court of appeals with proof of service on the respondent judge or judges and on all parties to the action in the trial court. The petition shall contain a statement of the facts necessary to an understanding of the issues presented by the application; a statement of the issues presented and of the relief sought; a statement of the reasons why the writ should issue; and copies of any order or opinion or parts of the record which may be essential to an understanding of the matters set forth in the petition. Upon receipt of the prescribed docket fee, the clerk shall docket the petition and submit it to the court.

(b) DENIAL; ORDER DIRECTING ANSWER. If the court is of the opinion that the writ should not be granted, it shall deny the petition. Otherwise, it shall order that an answer to the petition be filed by the respondents within the time fixed by the order. The order shall be served by the clerk on the judge or judges named respondents and on all other parties to the action in the trial court. All parties below

other than the petitioner shall also be deemed respondents for all purposes. Two or more respondents may answer jointly. If the judge or judges named respondents do not desire to appear in the proceeding, they may so advise the clerk and all parties by letter, but the petition shall not thereby be taken as admitted. The clerk shall advise the parties of the dates on which briefs are to be filed, if briefs are required, and of the date of oral argument. The proceeding shall be given preference over ordinary civil cases.

(c) Other Extraordinary Writs. Application for extraordinary writs other than those provided for in subdivisions (a) and (b) of this rule shall be made by petition filed with the clerk of the court of appeals with proof of service on the parties named as respondents. Proceedings on such application shall conform, so far as is practicable, to the procedure prescribed in subdivisions (a) and (b) of this rule.

(d) Form of Papers; Number of Copies. All papers may be typewritten. Three copies shall be filed with the original, but the court may direct that additional copies be furnished.